

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

IN RE:

Chapter 7

ALBERT PATRICK CASIELLO,

Case No. 01-17640-WCH

Debtor

DAVID STONE and BRISCO BALING CORP.

Plaintiffs,

vs.

Adv. Pro. No. 02-01009

ALBERT PATRICK CASIELLO,

Defendant.

MEMORANDUM OF DECISION

I. Introduction

The matter before the Court is Albert Patrick Casiello's Motion for Sanctions Against Plaintiffs David Stone and Brisco Bailing Corp. and Their Counsel Evans J. Carter, Esq. Pursuant to 11 U.S.C. § 105(a) and 28 U.S.C. § 1927 (the "Motion for Sanctions"). In the Motion for Sanctions, Albert Patrick Casiello (the "Debtor") alleges that counsel for David Stone ("Stone") and Brisco Baling Corp. ("Brisco," collectively the "Plaintiffs"), Evans J. Carter ("Carter"), needlessly and unreasonably prolonged and multiplied the above captioned adversary proceeding. The Plaintiffs and Carter respond that their actions were reasonable and request sanctions against the Debtor for filing the Motion for Sanctions. For the reasons set forth below, I will deny both the Motion for Sanctions and the Plaintiffs' counter-motion for sanctions.

II. Facts

The Debtor filed a Chapter 7 bankruptcy petition on October 2, 2001. On January 10, 2002, the Plaintiffs initiated this adversary proceeding with the filing of their Complaint of David Stone and Brisco Baling Corp. Objecting to Discharge of Debtor, Albert Patrick Casiello (the "Complaint"). In the Complaint, the Plaintiffs alleged that the Debtor became indebted to the Plaintiffs when the Plaintiffs sold a business to the Debtor, and that the sale would not have occurred but for the Debtor's fraud and misrepresentation. The Plaintiffs asked that the debts be declared nondischargeable under 11 U.S.C. §§ 523(a)(2), (4) and (6). The Debtor responded to the Complaint with his Answer of Debtor Albert Patrick Casiello to Complaint of David Stone and Brisco Baling Corp. Objecting to Discharge of Debtor (the "Answer") on February 8, 2002.

With the exception of the Plaintiffs' filing of their required M.L.B.R. 7026-1 Disclosure on April 3, 2002, nothing was filed with this Court for the next nine months. On November 13, 2002, the Court issued a Notice of Inactivity. The Plaintiffs objected on December 13, 2002, stating that they had deposed the Debtor and intended to file a motion for summary judgment within 90 days. The Debtor did not respond to the notice or the Plaintiffs' objection, and I sustained the Plaintiffs' objection and allowed the case to continue. Eleven months later, on November 12, 2003, the Plaintiffs filed Plaintiffs' Motion for Summary Judgment of their Complaint Objecting to a Discharge of Defendant Albert Patrick Casiello (the "Motion for Summary Judgment").

I granted the Motion for Summary Judgment due to the Debtor's failure to file a response. Thereafter, the Debtor filed an objection to the Motion for Summary Judgment and a motion to

reconsider my order granting it. After a hearing on December 22, 2003, I vacated my order granting the Motion for Summary Judgment and denied the Motion for Summary Judgment. I also issued a pre-trial order setting April 13, 2004 as the trial date, requiring the completion of all discovery by April 1, 2004 and setting April 7, 2004 as the due date for the joint pretrial statement.

On March 16, 2004, the Debtor filed Debtor/Defendant Albert P. Casiello's Motion to Disqualify Evans J. Carter as Trial Counsel (the "Motion to Disqualify"). In the Motion to Disqualify, the Debtor alleged that Carter was involved in the transactions underlying the Complaint and his involvement precluded his participation in this case. The Plaintiffs objected to the Motion to Disqualify on the grounds that Carter had no non-privileged knowledge of the facts material to the Complaint, and so could not be called to testify at trial.

On March 29, 2004, the Debtor filed Defendant Albert Patrick Casiello's Motion to Strike or Alternatively for a Protective Order Relative to the First Request for Admissions of Plaintiffs Brisco Baling Corp. and David Stone (the "Motion to Strike"). In the Motion to Strike, the Debtor stated that he received the Plaintiffs' requests for admissions on March 19, 2004, only twelve days prior to the April 1, 2006 discovery deadline. The Debtor argued that the Plaintiffs had submitted their requests for admission with the intent of forcing the Debtor to respond in less time than the 30 days that the Federal Rules of Civil Procedure allow. The Plaintiffs responded that their requests for admission asked the Debtor solely to admit or deny documents, all of which had previously either been annexed to the Complaint or used in depositions, and that responding to the requests in fewer than 30 days would not be burdensome. At a hearing on March 31, 2004, I denied both the Motion to Disqualify and the Motion to Strike and continued

the trial date to May 25, 2004. I stated that the Motion to Disqualify was ill taken and long overdue and I also noted that neither side had displayed much initiative in moving the proceedings along.

On April 19, 2004 the Plaintiffs filed Plaintiffs' Motion for a Discovery Compelling Order (the "Plaintiffs' Motion to Compel"). In it, the Plaintiffs stated that the Debtor had refused to permit the IRS to answer whether the Debtor had filed or paid certain tax returns which he had allegedly previously disclosed to the Plaintiffs. The Plaintiffs argued that whether the Debtor had filed the tax returns was important to their case and requested either a court order compelling the Debtor to permit the IRS to answer or, in the alternative, a punitive entry of judgment for the Plaintiffs. The Debtor filed an opposition to the Plaintiffs' Motion to Compel, stating that he had never signed or shown the subject tax returns to the Plaintiffs and arguing that none of the Debtor's tax returns were material to the issues in the Complaint.

On May 14, 2004, the Debtor filed a Motion to Continue Trial (the "Motion to Continue") and Defendant Albert P. Casiello's Motion to Compel Further Answers to Interrogatories from Plaintiff David Stone (the "Debtor's First Motion to Compel"). In the Motion to Continue the Debtor requested a new hearing date to allow the Debtor time to depose plaintiff David Stone. In the Debtor's First Motion to Compel the Debtor argued that eight of the Plaintiffs' answers to the Debtor's interrogatories were insufficient. The Debtor asserted that seven of the answers referred to pleadings or other documents filed with either this Court or with the Massachusetts Superior Court and that the eighth insufficient answer was an objection to a question requesting a computation of damages. The Debtor contended that he attempted to resolve the matter by scheduling a discovery conference but that the Plaintiffs refused, saying

that the documents spoke for themselves.

On May 17, 2004, the Debtor filed Defendant Albert P. Casiello's Motion for a Discovery Clarification Order (the "Motion for Clarification"). In the Motion for Clarification, the Debtor asked the Court for an order clarifying the boundaries for the deposition of Stone. The Debtor said that he anticipated evasive and incomplete testimony and that Carter had announced his intention to instruct Stone not to answer any questions regarding specific monetary damages. The Debtor also argued that he should be allowed to ask questions about a previous transaction between the Plaintiffs and Stone's wife, which the Debtor contended affected the value of the Debtor's later transaction with the Plaintiffs.

I held a hearing on the Debtor's First Motion to Compel, the Motion to Continue, and the Motion for Clarification on May 20, 2004. During that hearing I also addressed the Plaintiffs' Motion to Compel. I expressed my distaste for discovery disputes, continued the trial, and continued all of the discovery motions generally, in hopes that the parties could resolve their disputes without the need for further proceedings before me. I specifically addressed the Motion for Clarification and, while I declined to rule on it, stated that if Mr. Stone refused to answer questions about the damages he suffered by the Debtor's conduct I would forbid trial testimony on damages.

On July 21, 2004, the Debtor filed Defendant Albert P. Casiello's Motion to Compel the Attendance of Plaintiff David Stone, Individually and as the 30(b)(6) Designee of Brisco Bailing Corp., at Plaintiff's Continued Deposition (the "Debtor's Second Motion to Compel"). The Debtor stated that Debtor's counsel cut short the deposition of Stone to attend an emergency hearing and subsequently Carter and Stone refused to allow the Debtor's counsel to complete his

examination of Stone. The Debtor asserted that he had subpoenaed records regarding the status of Stone's junk dealer's license after his initial deposition of Stone and that he needed to examine Stone concerning those records. The Debtor also stated that he needed to further question Stone due to Stone's evasive and incomplete testimony during the initial deposition. The Plaintiffs objected, arguing that it was only on the day of the deposition that the Debtor's counsel revealed that he would have to cut the deposition short at 12:30 p.m., allowing for only two hours of questioning. The Plaintiffs also argued that the Debtor's stated reasons for needing to question Stone further were "bogus" because Stone answered questions about the junk dealer's license at the first deposition and because his testimony during the first deposition was neither evasive nor incomplete.

I held a hearing on the Debtor's Second Motion to Compel on August 17, 2004. At the hearing I suggested that the parties take the rest of the day to complete the deposition of Stone and I ordered that the deposition be completed within a week. I also continued the trial to September 8, 2004, and expressed my hope that there would be no further delay and no further discovery shenanigans.

A trial took place on September 8, 2004, and at the close of the Plaintiffs' presentation of evidence, the Debtor moved for an entry of judgment in his favor.¹ I granted the motion as to the Plaintiffs' § 523(a)(2) claim because the Plaintiffs presented relatively little evidence showing that the Debtor had made representations to the Plaintiffs and because I found no evidence that the Plaintiffs had justifiably relied on the Debtor's purported representations. I granted the motion as to the § 523(a)(4) claim because I found no evidence of the fiduciary relationship

¹Fed. R. Bankr. P. 7052(c) allows for the entry of a judgment on partial findings.

requisite for a finding of nondischargeability under that section. And I granted the motion as to the § 523(a)(6) claim because I found no evidence of any act by the Debtor that was intended to injure the Plaintiffs.

On September 21, 2004, the Debtor filed Defendant Albert Casiello's Motion for Costs Pursuant to Rule 7054(b) (the "Motion for Costs") along with the Motion for Sanctions. The Plaintiffs responded by filing the Plaintiffs' Opposition to Defendant Albert Patrick Casiello's Motion for Sanctions Against Plaintiffs David Stone and Brisco Baling Corp. and their Counsel, Evans J. Carter, Esq., Pursuant to 11 U.S.C. § 1927 (the "Opposition to the Motion for Sanctions") and the Plaintiff's Motion for Reconsideration of the Court's Allowance of Defendant's Motion for a Directed Verdict Under Bankruptcy Rule No. 7052 (the "Motion for Reconsideration"). On September 29, 2004, the Debtor filed Defendant Albert Patrick Casiello's Motion for Sanctions Pursuant to Fed. R. Bank. Proc. 9011 (the "9011 Motion"). On October 20, 2004, I held a hearing on the Motion for Costs, the 9011 Motion, the Motion for Reconsideration, and the Motion for Sanctions. I granted the Motion for Costs, in part, denied the Motion for Reconsideration, and denied the 9011 Motion and the Motion for Sanctions because they were not timely filed. I stated that

the plaintiff appears to have stalled discovery and prolonged the time and costs of this case through delay and failure to cooperate with defendant's counsel. Furthermore, when I gave my judgment originally, I noted that the plaintiff did not proffer sufficient evidence to sustain any of its allegations, making the defendant the clear prevailing party.²

The Debtor appealed my decision denying the Motion for Sanctions to the United States District Court for the District of Massachusetts. Brisco appealed my decision granting the

²Transcript, Oct. 20, 2004, p. 3.

Debtor's motion for judgment on partial findings and also elected to appeal to the District Court.

On July 26, 2005, the District Court issued its decision on the Debtor's appeal of my denial of the 9011 Motion and the Motion for Sanctions. The District Court reversed my decision denying the Motion for Sanctions as untimely, but upheld without comment my denial of the 9011 Motion. The District Court remanded the case for a determination of whether a bankruptcy court could issue sanctions under 28 U.S.C. § 1927 and, if it could, whether such sanctions were appropriate in this case. On September 7, 2005, I held a hearing on the issue of jurisdiction to issue sanctions under § 1927 and took the matter under advisement. On November 7, 2005, I issued my decision in which I held that bankruptcy courts are empowered to issue sanctions pursuant to § 1927.

On January 3, 2006, the Debtor filed a Motion in Limine of Defendant Albert Patrick Casiello to Preclude Plaintiff's Counsel From Introducing Evidence Unrelated to the Issue at Bar and a Motion in Limine of Defendant Albert Patrick Casiello to Preclude Plaintiff's Counsel from Interrogating Defendant's Counsel Relative to the Underlying Transaction (together, the "Motions in Limine"). On January 17, 2006, I held a hearing on the Motions in Limine and on the Motion for Sanctions. At the hearing, I informed the parties that I would not consider evidence not relating to "the proceedings in the case." I thus effectively granted the Motions in Limine, though I did not enter an order to that effect. After presenting brief arguments, the parties were content to rest on their pleadings and on the record; I took the matter under advisement for further consideration of whether to apply my § 1927 powers.

III. Analysis

28 U.S.C. § 1927 provides that

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The First Circuit has said that a finding of subjective bad faith is not necessary for the imposition of § 1927 sanctions, although sanctions will always be justified by such a finding. *Cruz v. Savage*, 896 F.2d 626, 631-32 (1st Cir. 1990). The First Circuit has not quantified the word “multiply”, but it has defined “vexatious”, stating that “[b]ehavior is vexatious when it is harassing or annoying, regardless of whether it is intended to be so.” *Id.* at 632. Under the objective standard employed by the First Circuit sanctions are appropriate where “. . . an attorney acts in disregard of whether his conduct constitutes harassment or vexation, thus displaying a ‘serious and studied disregard for the orderly process of justice.’” *Id.* (citations omitted). “Conduct sanctioned must be more severe than mere negligence, inadvertence, or incompetence.” *Id.* at 632. The sanctions allowed by 28 U.S.C. § 1927 are punitive. *United States v. Kouri-Perez*, 187 F.3d 1, 7 (1st Cir. 1999). “. . . [B]ecause of its penal nature, § 1927 must be strictly construed.” *Indianapolis Colts v. Baltimore*, 775 F.2d 177, 182 (7th Cir. 1985). Courts should employ the “least extreme sanction reasonably calculated to achieve the appropriate punitive and deterrent purposes.” *United States v. Kouri-Perez*, 187 F.3d at 8.

The Debtor argues that Carter should be sanctioned because of the following conduct: filing the Complaint without sufficient evidence to demonstrate key elements of the case; waiting for almost two years before moving forward with the adversary proceeding; responding insufficiently to the Debtor’s interrogatories and subsequently refusing to participate in a M.L.B.R. 7037-1 conference, which refusal required the Debtor to file the Debtor’s First Motion

to Compel; and refusing to make David Stone available to the Debtor so that the Debtor could finish deposing Mr. Stone, which refusal required the Debtor to file the Debtor's Second Motion to Compel. The Plaintiffs respond that the Debtor should be estopped from filing a motion for sanctions because he has unclean hands; that the Debtor's filing of the Motion for Sanctions warrants the imposition of § 1927 sanctions on the Debtor's counsel; that the Complaint was not frivolous; that their laxity in prosecuting the Complaint was harmless and that the Debtor could have moved the process along more quickly had he wanted to; and that their answers to the Debtor's interrogatories and their refusal to allow the completion of Mr. Stone's deposition were reasonable.

The first instance of sanctionable conduct, argues the Debtor, is Carter's filing of the Complaint without sufficient evidence to demonstrate key elements of the case. The Plaintiffs counter that the Complaint was not frivolous and that, even if it were, the filing of a complaint is not sanctionable conduct under § 1927 because filing a complaint does not multiply or prolong proceedings, it initiates them.

Several courts that have considered this question agree with the Plaintiffs that filing a complaint is not sanctionable under § 1927. *See, e.g., MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1382 (Fed. Cir. 2005); *Brown v. Baden (In re Yagman)*, 796 F.2d 1165, 1187 (9th Cir. 1986), *amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987); *Macheska v. Thomson Learning*, 347 F.Supp. 2d 165, 181 (M.D. Pa. 2004); *Goldstein v. Marine Midland Bank, N.A. (In re Goldstein)*, 201 B.R. 1, 8 (Bankr. D. Me. 1996) ("There can be no delay in litigation when there is not yet even litigation"). In *Yagman*, the Ninth Circuit stated that "[s]ection 1927 does not apply to initial pleadings, since it addresses

only the multiplication of proceedings. It is only possible to multiply or prolong proceedings after the complaint is filed.” 796 F.2d at 1187.

Some courts, however, do consider the initiation of a proceeding sufficient to justify the imposition of § 1927 sanctions. *See, e.g., Overnite Transp. Co. v. Chicago Indust. Tire Co.*, 697 F.2d 789, 794 (7th Cir.1983). In *Overnight Transp. Co.*, the Seventh Circuit made an exception to the rule endorsed by the *Yagman* court and those in agreement with it. *Id.* Although the Seventh Circuit recognized that “. . . the legislative history surrounding section 1927 reveals the congressional intent to impose sanctions only upon those attorneys who needlessly delay *ongoing* litigation,” the court approved of cases in which § 1927 sanctions were imposed on an attorney for initiating a proceeding because it found that such cases were “. . . limited to situations where the suit was without either a legal or factual basis and the attorney was or should have been aware of this fact.” *Id.*

Although I agree with the holding in *Yagman*, I must acknowledge that an adversary proceeding filed in a bankruptcy case is different from other types of civil litigation in which § 1927 sanctions might be imposed, as it does not represent the beginning of the proceedings in the debtor’s bankruptcy case. In some cases, such as when a creditor files a claim, a debtor objects to the claim, and the creditor later sues the debtor asserting that the claim is nondischargeable or otherwise recoverable, the initiation of an adversary proceeding in a bankruptcy case will not represent the first occasion for the parties to face each other in the bankruptcy court.³

³An example of such a case is *In re Peoro*, 793 F.2d 1048 (10th Cir. 1986), in which a creditor filed two adversary proceedings and numerous other motions in his attempt to protect his lien. In that case, lower courts separately sanctioned the creditor’s attorney under § 1927 for

It is possible to reconcile this procedural reality with the logically strong, but seemingly unyielding, position taken by the *Yagman* court. If the parties here had engaged in substantive litigation within the context of the Debtor's bankruptcy case on the same issues as those presented in the Complaint, then the filing of the Complaint could be considered a multiplication of the proceedings. That was not the case here, however, as the Plaintiffs have filed nothing in the Debtor's main bankruptcy case besides the Complaint. Therefore, the filing of the Complaint cannot be a basis for sanctioning Carter pursuant to § 1927.

The next instance of sanctionable conduct, argues the Debtor, is Carter's laxity in pursuing the Complaint. It is true that after Carter filed the Complaint in January, 2002, he took little action until November, 2003 when he filed the Motion for Summary Judgment. While I discourage such laxity in prosecuting an adversary proceeding, the Debtor was free at any time to file a motion to dismiss or to otherwise move the proceedings forward, and he chose not to. Furthermore, it does not appear that Carter's delay in prosecuting the Complaint multiplied the proceedings by making them more complex, expensive, or time-consuming than they would have been if he had moved quickly after filing the Complaint. Therefore, Carter's long wait before taking action on the Complaint is not sanctionable under § 1927.

The Debtor asserts that several of Carter's answers to the Debtor's interrogatories were insufficient because they raised unfounded objections or because they pointed to other pleadings or documents in violation of Fed. R. Bankr. P. 7033. Carter's answers to interrogatories do appear to have referred impermissibly to documents contained in the pleadings. The damage that

each individual instance of delaying behavior. The case does not address whether it is appropriate to impose § 1927 sanctions for filing a complaint, or whether the filing of a complaint was the basis for any of the sanctions that were imposed.

this did to the Debtor's case, however, is not evident. The Debtor argues that he was unable to file a motion for summary judgment due to Carter's inexact answers to interrogatories. Indeed, it does not appear from the record that the Plaintiffs ever appeased the Debtor by supplementing their answers to interrogatories, and yet the Debtor was able to proceed to trial without making another request for the information and was able to marshal sufficient evidence to prevail at the trial on a motion for judgment on partial findings.

The Plaintiffs' answers to interrogatories were not so incomplete that they were vexatious or unreasonable, although they may have been in technical violation of the rules that govern discovery. According to the Plaintiffs, the response to interrogatories contained references to documents because the Debtor, having been engaged in state court litigation with the Plaintiffs for several years regarding the same transaction that is at issue here, had a large number of pertinent documents in his possession already. Full and specific responses to interrogatories are important to the discovery process and Carter should have been more forthcoming, but his failure to respond adequately is not so egregious as to warrant the imposition of § 1927 sanctions.

The Debtor also argues that Carter skewed the facts in the affidavit he submitted in support of the Motion for Summary Judgment. Although the Debtor's allegation contains no specifics, I will assume that he refers to the affiant's assertion that the Plaintiffs relied upon the Debtor's misrepresentations, an assertion I found unsupported by the evidence introduced at the trial. There is no evidence to demonstrate that Carter knew the affidavit he was submitting to be untrue, or that he engaged in any "skewing" of facts in the affidavit.

The Debtor further contends that Carter's refusal to arrange for the completion of the deposition of Stone unreasonably and vexatiously multiplied the proceedings because it forced

the Debtor to file the Debtor's Second Motion to Compel. Carter claims that he refused to accommodate the Debtor because the Debtor refused to complete the deposition on May 20th, an action that Carter argues was intended to ". . . contrive and delay the deposition because of [Debtor's counsel's] lack of knowledge of the complaint"⁴ Indeed, Debtor's counsel did cut short the May 20th deposition after only two hours to attend an emergency meeting and he only informed Carter of this meeting on the day of the deposition. While Carter should have accommodated Debtor's counsel's request to continue the deposition on another day, the behavior of Debtor's counsel was also poor, and Carter's behavior was not so bad as to warrant the imposition of sanctions. His behavior does not demonstrate a serious or studied disregard for the orderly process of justice, although he undoubtedly multiplied the proceedings by forcing the Debtor to file the Debtor's Second Motion to Compel.

The Debtor also argues that Carter should be sanctioned pursuant to § 1927 because he used misleading exhibits at trial. Any problems the Debtor had with the exhibits entered by Carter at the trial should have been presented during the trial in the form of objections. Now is not the time for the Debtor to argue the deficiencies – legal or substantive – of the Plaintiffs' trial exhibits. Furthermore, whether the Plaintiffs' trial exhibits were proper, their submission did nothing to multiply the proceedings as the case was resolved by my entry of a judgment on partial findings in favor of the Debtor at the close of the Plaintiffs' case. I cannot base § 1927 sanctions on the Plaintiffs' introduction of certain exhibits at the trial.

The Plaintiffs' contention that the Debtor is estopped from filing the Motion for

⁴Memorandum of Evans J. Carter in Opposition to Defendant Albert Patrick Casiello's Motion for Sanctions Pursuant to 28 U.S.C. § 1927, p. 5.

Sanctions because he has unclean hands is based on the fraud and larceny allegations made by the Plaintiffs in the Complaint. Because I found that the Plaintiffs had presented insufficient evidence to prevail on any of their claims, I cannot now find that the Debtor has unclean hands such that he cannot bring a motion for sanctions.

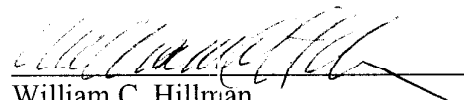
In the Opposition to the Motion for Sanctions, the Plaintiffs requested that I impose § 1927 sanctions on the Debtor's attorney for bringing the Motion for Sanctions. Because the Motion for Sanctions makes reasonable arguments and is not vexatious, I will deny the Plaintiffs' request for § 1927 sanctions.

In denying the Motion for Sanctions, I am acutely aware of what might seem my contradictory statements at the October 20, 2004 hearing where these matters were first addressed. At that hearing, I said that Carter had prolonged the proceedings and increased the costs of the litigation. Upon further reflection on the facts of the case, that was the correct pronouncement, and it justified my decision to award costs to the Debtor. Carter's conduct was not commendable, but neither was it so bad as to warrant a further, personal punitive sanction against him.

IV. Conclusion

For the reasons stated above, I will enter an order denying the Debtor's Motion for Sanctions and the prayer for sanctions in the Plaintiffs' Opposition to the Motion for Sanctions.

Dated: 7/3/06


William C. Hillman
United States Bankruptcy Judge